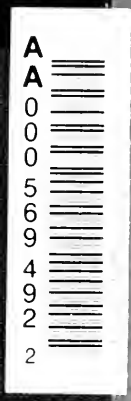

The Taxing Power--Its Limitations.

By

Creed Haymond

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ARGUMENT

OF

CREED HAYMOND

BEFORE THE SUPREME COURT OF CALIFORNIA,
IN SUPPORT OF THE REVENUE LAW
OF 1881.

REPORTED BY A. H. CUMMINS.

SAN FRANCISCO:
H. S. CROCKER & CO., STATIONERS AND PRINTERS, 215, 217, 219 BUSH STREET.
1881.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

JOHN H. BURKE,
Petitioner,

vs.

ALEXANDER BADLAM, Assessor of the City and County of San Francisco,
Respondent.

The Taxing Power—Its Limitations.

ARGUMENT OF CREED HAYMOND

Before the Supreme Court of California upon the validity of the Revenue Law of 1881.

Points Made and Authorities Cited:

I.

That the framers and promoters of the New Constitution never intended to impose a system of double taxation upon any portion of the property in this State. (Debates in Constitutional

Convention. Speeches of Gen. Howard and his letter. Speeches of Terry and Campbell. Editorials of S. F. *Chronicle*).

II.

That double taxation not only finds no support in the provisions of the New Constitution, but is prohibited thereby. (Sec. 1, Art. 13, New Constitution of California; Cooley on Taxation, pp. 2, 200, 173 and 25; Cooley on Constitutional Limitations, pp. 495 and 501; 1 Potter, Law of Corporations, pp. 11 and 12; *Smith* vs. *Exeter*, 37 N. H., 558; *Smith* vs. *Birley*, 9 N. H., 423; *People* vs. *Coleman*, 4 Cal., 46; *Taylor* vs. *Palmer*, 31 Cal., 240; *Ex parte Wall*, 48 Cal., 279; *People* vs. *Lynch*, 51 Cal., 28; *Atkins* vs. *Gamble*, 42 Cal., 100; *Hunsaker* vs. *Wright*, 30 Ill., 147; *Bureau County* vs. *Chicago R. R. Co.*, 44 Ill., 237; *Chicago & Northwestern R. R. Co.* vs. *Boone Co.*, 44 Ill., 242; *Glasgow* vs. *Rouse*, 43 Mo., 490; 2 Kent's Commentaries, S. P. 331; *Dartmouth College* vs. *Woodward*, 4 Wheaton, 636; *Providence Bank* vs. *Billings*, 4 Pet., 562; Field on Corporations, Sec. 15. *Jones* vs. *Davis*, Law Reporter, vol. 10, p. 122; *Oliver* vs. *Washington Mills*, 11 Allen, 272. See also authorities cited under the 3rd point).

III.

That if the Constitution by express provision did provide for double taxation, such provision would be inoperative and void, because in violation of the fundamental principles of republican government, recognized and declared in the Bill of Rights. (Cooley's Const. Limitations, pp. 36, 37, 41, Note 1, 175; Angell & Ames on Corporations, sec. 436; 1 Potter on Law of Corporations,

secs. 217, p. 192; Cooley on Taxation, pp. 495 add 177; 3 Knight's England, p. 417; *Loan Association* vs. *Topeka*, 20 Wallace, 662; Case of Washington Avenue, 69 Penn. St. R., 362; *People* vs. *Mayor of Brooklyn*, 6 Barb. 214; *Woodbridge* vs. *City of Detroit*, 8 Mich., 306; *Wilkinson* vs. *Leland*, 2 Peters, 627; *Hatch* vs. *Vermont Central R. R. Co.*, 25 Vermont, 49; *Railroad Co.*, vs. *Davis*, 2 Dev. and Bat., 451: *Rogers* vs. *Bradshaw*, 20 J. R., 735; *People* vs. *Platt*, 17, J. R., 195; *Powers* vs. *Bergen*, 2 Selden, 358; *Goshen* vs. *Stoughton*, 4 Conn., 209; *Hanson* vs. *Vernon*, 27 Iowa, 42; Hilliard on Taxation, p. 24; sections 1, 14, 21 and 23 of the New Constitution of California; secs. 1 and 2 of the Bill of Rights, Const. of Kentucky, 1799 and 1850; 2 Mills' Pol. Econ., 370 and 372; *People* vs. *Lynch*, 51 Cal., 20; *Lexington* vs. *McQuillan's Heirs*, 9 Dana, 513, 516; 14th Amendment to Federal Constitution).

IV.

That the taxation of all the property of a corporation to a corporation, and then the taxation of the shares of capital stock therein to the shareholders is double taxation. (Cooley on Taxation, pp. 392, 393, 168; 1 Potter, Law of Corporations, secs. 254, 262, 23d sec. 555, p. 673; Field on Corporations, sec. 123, p. 138, sec. 128, p. 143; Pierce on Railroads, p. 110, 144 and 79; Angell & Ames on Corporations, secs. 460, 561; *Hannibal & St. Jo. R. R. Co.* vs. *Shaklett*, 30 Mo., 558, 560; *Smith* vs. *Exeter*, 37 N. H., 558; *Rome R. R. Co.* vs. *Rome*, 14 Georgia, 276; *Salem Iron Factory* vs. *Danvers*, 10 Mass., 516; *Smith* vs. *Burley*, 9 N. H., 423; Webster's Dic. "stocks;" Abbott's Law Dic. "stocks;" *Com.* vs. *Lowell Gas Co.*, 12 Allen, 76; *Com.* vs *Ham. Man. Co.*, 12 Allen, 301; *Com.* vs

People's Five Cent Savings Bank, 5 Allen, 431; *State* vs. *Branin*, 3 Zab., (N. Y.) 485; *Atkins* vs. *Gamble*, 42 Cal., 86; *Hawley* vs. *Brumagim*, 33 Cal., 394.

V.

That the relation of debtor and creditor does not exist between a savings and loan association and its depositors. (Civil Code, sections 1912, 1914, 571, 572, 573, 576 and 579. Hilliard on Taxation, p. 31. *Com.* vs. *Peoples*, 5 Allen, 428).

VI.

That the power of taxation is dormant unless a constitutional law exists which calls it into action. That the only law in force is the Act of 1881. That the principle of equality and uniformity pervades and dominates the whole Act, and unless such principle *can* be successfully maintained as the essence of taxation, the law falls and the petitioner in that event fails. (Cooley Const. Lim., pp. 177, 517, 518 and 520; *Reed* vs. *Omnibus R. R. Co.*, 33 Cal., 29; *Campan* vs. *Detroit*, 14 Mich., 285; *Warren* vs. *Charlestown*, 2 Gray, 99, 100; *State* vs. *Perry Co.*, 5 Ohio St., 507, and *Slauson* vs. *Racine*, 13 Wis., 403.)

ARGUMENT.

May it please the Court:

The petitioner, a citizen and tax-payer of the City and County of San Francisco, seeks in this proceeding to obtain a peremptory writ of mandate directed to the respondent, commanding him to place upon the Tax List and to assess certain shares of stock in corporations; and also certain deposits made by about ten thousand persons in the Savings Union Society, San Francisco, a savings institution incorporated under the laws of this State.

It is claimed in this controversy that authority for such listing and assessment is to be found in Section 1 of Article 13 of the New Constitution, which reads as follows:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership; *provided*, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits or debts due to *bona fide* residents of this State."

And it is maintained that Sections 3,607, 3,608 and the 6th subdivision of Section 3,617 of the Political Code of this State are unconstitutional. They read as follows:

"SEC. 3,607. All property in this State, not exempt under the laws of the United States, excepting growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, is subject to taxation as in this code provided; but nothing in this code shall be construed to require or permit double taxation.

"SEC. 3,608. Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares, and also of the corporate property, would be double taxation. Therefore, all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor.

"SEC. 3,617 Sub. 6. The term credits means those solvent debts, not secured by mortgage or trust deed, owing to the person, firm, corporation or association assessed. The term debts means those unsecured liabilities owing by the person, firm, corporation or association, assessed to *bona fide* residents of this State, or firms, associations or corporations doing business therein; but credits, claims, debts and demands due, owing or accruing for or on account of money deposited with saving and loan corporations shall, for the purpose of taxation, be deemed and treated as an interest in the property of such corporation, and shall not be assessed to the creditor or owner thereof."

Before proceeding to consider the questions involved it may be well to glance at the condition of affairs existing at the time of the adoption of the New Constitution.

The immense expenditures of the Civil War had ceased, inflated values were destroyed, great industries were paralyzed, want and hunger were in the land, with riot and bloodshed. These things, the necessary attendants of civil war, were upon us; the work of man was assailed for results that were inevitable.

The election at which delegates to the Constitutional Convention were chosen was preceded by a campaign unparalleled for its criminations and recriminations. The deliberations of that body were not marked by that calmness which their importance demanded. When the Constitution which it had framed was submitted to the people for ratification the appeals made for and against it but intensified the pre-existing feeling. On the part of those who opposed its adoption it was predicted that the result of its adoption would be the destruction of all property interests in the State.

The same power which out of the chaos of civil war directed the nation to a prosperty such as the world has never known, presided at the deliberations of this convention. Its framers builded better than they knew—perhaps better than they intended, and it may be that a cheerful acquiescence in the will of the people, a wise reading of the provisions of the constitution by an intelligent and conservative court will unravel the tangled skein, and make our golden State a participator in the prosperity now enjoyed by her sisters.

For instance, it was urged that the vast power of individual assessment lurked in the grant to the State Board of Equalization. At the very

suggestion capital, always timid, sought concealment, and property values were impaired; but when the calm light of reason was cast upon the question—when the rules of rational interpretation were applied with an even judgment—it was found that no such unlimited power lay hidden within the grant; that it contained no menace to property or to the great interests upon which the welfare of society depends. With those provisions, as interpreted by the Court, the people are satisfied.

Close upon the adoption of the New Constitution came a Legislature, composed in part of men who had opposed its adoption; who had seen in it but raids upon rights which they esteemed sacred; they foretold a funeral, and were swift in the preparation of the corpse; composed in part of others who possessed no very clear understanding of the objects of Government, nor any great amount of devotion to the principles which underlie ours,—who, like the wrecker upon a rock-bound coast, welcomed the storm, in the hope that out of its disaster he might seize a bale of merchandise, or strip the jewels from the body which the sea gave up; and it was composed in part of others who were possessed of statesmanlike opinions, and of broad and catholic views upon the science of government, but unhappily these were in the minority.

The result was, attacks upon every interest; volumes of laws which this tribunal has adjudged in violation of the instrument which it was claimed demanded their enactment. The consequence—a withdrawal of capital from the channels of trade and commerce; its investment in United States bonds, or its hoarding in banks of deposit.

A great city, the steel arms of which reach out to grasp the trade of the interior of the republic and of the very heart of a sister nation—a city

which sits upon the pathway of the trade of the Orient, and is in a position to demand tribute from a world's commerce, finds every industry paralyzed; her population stationary; no buildings being erected to give employment to her intelligent mechanics; no great manufacturing establishments are rising, in which raw material, so abundant in the State, is to be converted into articles of commerce; no industries are projected to give employment to teeming thousands—to save from hoodlumism and crime the children reared in her homes. This is said to be the result of the action of the people of the State of California, the most intelligent in the world, in adopting the New Constitution.

I am here to deny the proposition; to accept in good faith the work of the people upon the subject of Revenue and Taxation, and to vindicate its wisdom; to charge these evils upon the financial system adopted by the first Legislature which assembled under that Constitution, and to maintain that such a system finds no countenance in the fundamental law of this State; to vindicate the present revenue law, and to point to evidence that under its influence property is beginning to have a value, trade to find resumption, and to predict that if it is maintained the evils will disappear.

The petitioner in this proceeding, impelled, I must believe, by a sense of patriotic duty, challenges the constitutionality of the new law.

It is well that he has done so; it needs the authoritive declaration of the Court that this law is constitutional to restore confidence; to set in motion the life-giving currents which bear upon their flood employment for industry and food for hunger.

We join issue with the petitioner, and let our cause stand or fall upon the maintenance of the propositions herein contended for.

First. That the framers and promoters of the New Constitution never intended to impose a system of double taxation upon any portion of the property in this State.

Second. That double taxation not only finds no support in the provisions of the New Constitution, but is prohibited thereby.

Third. That if the Constitution by express provision did provide for double taxation, such provision would be inoperative and void, because in violation of the fundamental principles of republican government, recognized and declared in the Bill of Rights.

Fourth. That the taxation of all the property of a corporation to a corporation, and then the taxation of the shares of capital stock therein to the shareholders is double taxation.

Fifth. That the relation of debtor and creditor does not exist between a savings and loan association and its depositors; and

Sixth. That the power of taxation is dormant unless a constitutional law exists which calls it into action; that the only law in force is the Act of 1881. That the principle of equality and uniformity pervades and dominates the whole act, and unless such principle can be successfully maintained as the essence of taxation the law falls and the petitioner in that event fails.

PRELIMINARY.

Before passing to the consideration of the question whether the provisions of the codes involved in the discussion of the first three propositions are in contravention of the Constitution, it may be well to repeat the rule of exposition which has been often enunciated by courts, that when a statute has been passed with all the forms and solemnities required to give it the force of law, the presumption is in favor of its validity, and a court will not declare it to be in violation of the fundamental principles of our government, and for that reason void, unless its invalidity is established beyond a reasonable doubt.

It is going a great way to say of the Legislature a co-ordinate department of government, whose specialty is the enactment of laws, that any one of its acts has no foundation in the Constitution, an instrument which the law-makers have sworn to support, and which we must not suppose that they have violated in the absence of the clearest proof. Hence courts have always approached this subject with great delicacy, and have ever manifested themselves disposed to maintain the law in the absence of an entire conviction of its unconstitutionality. This much respect is certainly due to that department of the government, and this Court has always most cheerfully extended it, and ever will.

Commonwealth vs. *The People's Bank*, 5th. Allen, 431.

Bureau County vs. *The Chicago Railway Co.*, 44th Ills., 235.

Bourland vs. *Hildreth*, 26th Cal., 161.

The application of this rule is well considered by Mr. Justice McKinstry in the opinion in the case of *People* vs. *Lynch*, 51 Cal. 26.

The provisions of the codes which we seek to maintain announce principles so congenial to justice, and so consonant with the principles of equity, and so reasonable as to challenge the approbation of all right-thinking men, and they ought to be and will be cheerfully sustained, if not in contravention of fundamental law.

We will now proceed to the consideration in detail of the propositions heretofore announced, and

FIRST.—THAT THE FRAMERS AND PROMOTERS OF THE NEW CONSTITUTION NEVER INTENDED TO IMPOSE A SYSTEM OF DOUBLE TAXATION UPON ANY PORTION OF THE PROPERTY IN THE STATE.

It was charged by members of the minority in the Constitutional Convention that double taxation was the purpose of the Article on "Revenue and Taxation," framed and adopted by the majority. Although the debates have not as yet been authoritatively given to the public, the Justices of this Court must remember that such charges were indignantly met and repelled.

In the canvass that followed the formation of the New Constitution, and preceded its adoption, its opponents reiterated these charges, and again the fathers and promoters of that instrument met and controverted them.

Gen. Volney E. Howard, the leading spirit in the majority, took the stump, and in speech after speech denied the existence of any such purpose, or that such an inference could be drawn from the Article on "Revenue and Taxation." Not con-

tent with such denials, he, on the 5th of April, 1879, published in the San Francisco *Chronicle*, over his signature, an open letter, in which he uses this significant language: "The statement that there is any double taxation in the New Constitution is a shameless and unblushing misrepresentation, or an ignorant assertion. The instrument not only shuts out double taxation, but furnishes the highest possible guards against its occurrence."

"Again," said the same distinguished advocate of the New Constitution, (*S. F. Chronicle*, April 11th,) "the value is to be ascertained as provided by law. That is, as the Legislature may direct, and therefore it would be in the power of the Legislature to adopt a system which would prevent double taxation if ever resorted to. It is not to be presumed that the Legislature would organize or tolerate a system of double taxation and false values, which the Constitution forbids!"

Said the Hon. Alex. Campbell in his celebrated "Platt's Hall Speech," delivered April 15th, 1879, "This Constitution provides for the taxation of the rich and poor alike; it does not provide double taxation, for it provides that all property shall be taxed in proportion to its value.

I have not before me the speeches of the Hon. D. S. Terry, but my recollection is, that utterances equally strong and of the same import will be found in them.

The San Francisco *Chronicle* was the leading paper which lent support to the New Constitution —its chief promoter—it denied the existence of any such power. In its issue of April 5th, 1879, appeared an editorial upon the subject, from which editorial I quote: "The New Constitution says, "all property shall be taxed in proportion to its "value, to be ascertained as provided by law. "Now, the law cannot require the same thing to "be taxed twice or three times, for that would not

" be taxation in proportion to its value." And so during the whole of that campaign was the denial that the New Constitution authorized or permitted double taxation put before the people by its leading advocates and promoters.

SECOND.—That double taxation not only finds no support in the provisions of the New Constitution, but is prohibited thereby.

In introducing the subject of discussion under this head, it is proper to refer to some general rules.

" Taxes," says Mr. Cooley, in his work on taxation, p. 2, " differ from subsidies in being regular and orderly; and they differ from the forced contributions, loans and benevolences of arbitrary and tyrannical periods, in that they are levied by authority of law, and by some rule of proportion, which is intended to insure uniformity of contribution, in order to a just apportionment of the burdens of government. In an exercise of the power to tax, the purpose always is, that a common burden shall be sustained by common contributions, regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. While, therefore, the power is great and imperative, it is not arbitrary; it rests upon fixed principles of justice, which have for their object the protection of the taxpayer against exceptional and invidious exactions; and it is to have effect through established rules, operating impartially."

The same learned author, at page 200, remarks: " We are therefore at liberty to suppose that the two main objects had in view in framing the provisions of any tax law, were, first, the providing a

public revenue; and, second, the securing of individuals against extortion and plunder, under the cover of the proceedings to collect the revenue."

In his work upon "Constitutional Limitations," page 495, it is said: "In the second place, it is of the very essence of taxation that it be equal and uniform; and to this end that there should be some system of apportionment. Where the burden is common, there should be common contribution to discharge it. Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are alike protected, so all alike should bear the burden, in proportion to the interests secured. Taxes by the poll are justly regarded as odious, and are seldom resorted to for the collection of revenue; and when levied upon property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions. In this particular, State Constitutions have been very specific; but in providing for equality and uniformity they have done little more than to state in concise language a principle of constitutional law which is inherent in the power to tax."

In a well considered New Hampshire case, (*Smith* vs. *Exeter*, 37, N. H., 558.) Perley, Chief Justice, upon this topic observes, that "it is a fundamental principle in taxation, that the same property shall not be subject to a double tax, payable by the same party either directly or indirectly, and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow as a legal conclusion that the Legislature could not have intended the same property should be subject to another tax, though there may be general terms in the law, which would seem to imply that it was to be taxed a second time. In Smith vs. Burley, 9 N. H., 423,

this rule of construction was applied to a case where the property of a corporation was taxable to the corporation in the town where it was situated, and the attempt was to collect a tax assessed on a stockholder in the town where he resided, under the provision of the statute which made stockholders in corporations liable to be taxed for their stock in the places where they resided. The statute then in force provided that: "All stock in any corporation or company on which any income was received or any dividend made, should be taxed to the owner in the town where he resided." (Statute of January 4, 1833.) It was held, notwithstanding these general terms making the stock taxable to the stockholder, that, inasmuch as the property of the corporation was legally taxed to the corporation under the law then in force, the stockholder could not be taxed for his stock in the place where he resided, because that would indirectly amount to a double taxation of the same property. Parker, J., in delivering the opinion of the Court, says: "A taxation of the shares at their appraised value would in fact be a double taxation—once to the corporation itself and again to the corporators, which would be unjust, oppressive and unconstitutional."

If the petitioner may succeed in this proceeding he must successfully maintain the following proposition; that under the provisions of our constitution, the Legislature not only may, but must, under the taxing power, impose upon property of the value of $1,000, belonging to a corporation, a tax precisely double that which it can impose upon property of the same value, and of the same kind, owned by a natural person; that in case of property owned by a corporation, it must tax the property itself to the corporation, and the shares of stock to the stockholders; while in case of property owned by an individual, the property alone is taxed.

Our contention is that the proposition will find no support in the provisions of the New Constitution, but is clearly prohibited thereby. Section 1 of Article 13, declares that "all property in the State not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law."

It is true that the section contains a definition of property, which is declared to include: "moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership."

This definition in no manner enlarges the power of the Legislature over the subject matter, for when you have once declared that all property in the State shall be taxed, you have reached the limit of which language admits.

We maintain that the provision that all property in this State shall be taxed in proportion to its value, is the exact equivalent of a declaration that taxation shall be equal and uniform, and in this we are not left to conjecture, but may rest our position upon indisputable authority. It is a fundamental principle of constitutional construction, that where a phrase in the Constitution of one State is borrowed from the existing constitution of another State, it is adopted in view of the construction which has been placed upon it by the Courts of the State from which it was borrowed. (*People* vs. *Coleman*, 4 Cal., 46; *Taylor* vs *Palmer*, 31 Cal., 240; *Ex-parte Wall*, 48 Cal., 279; *People* vs. *Lynch*, 51 Cal., 28.) The provision in question in our Constitution is substantially the same as that in the Constitution of the State of Illinois. The second section of the ninth article of the Constitution of that State declares "that the General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of

his or her property." The provision of our Constitution, Art. 1, is that "all property in the State shall be taxed in proportion to its value, to be ascertained as provided by law."

The Supreme Court of the State of Illinois, in the case of *Hunsaker* vs. *Wright, et al.*, 30 Ill., p. 147, in interpreting the provision of the Illinois Constitution in question, uses the following language: "These provisions were manifestly inserted in the fundamental laws for the purpose of insuring equality in the levy and collection of the taxes to support the government, whether levied for State, county or municipal purposes. The design was to impose an equal proportion of these burthens upon all persons within the limits of the district or body imposing them."

Referring to the same provision, Mr. Justice Breese, in delivering the opinion of the Court in *Bureau County* vs. *The Chicago R. R. Co.*, 44th Ill., 237, says: "The great central and dominant idea in that instrument is uniformity of taxation. A mode has been furnished by law, by which this uniformity shall be attained, and that is, that the property shall be assessed at its actual value, and the rate of taxation placed upon it shall be regardless of persons or property." Again, at p. 238, he inquires: "Does the power exist anywhere, to destroy the cardinal principle of uniformity of taxation, so forcibly and prominently insisted upon by the Constitution?" and says: "This is a great question, affecting not only railroad corporations, but every property owner and tax payer in the State. It seems to us there is something so monstrous in the proposition, as to be indefensible by fair argument. Regarding uniformity as the vital principle, the dominant idea of the Constitution, where can the power reside to produce its opposite? Where is the power lodged, in view of this principle, to compel A to pay on his land

or personal property, of no more value than the same kind of property belonging to B, forty per cent. more taxes than are assessed against B? We affirm such a power nowhere exists, and if it did, it would be so revolting in its exercise to the lowest sense of justice with which our species is imbued, as to justify any and every lawful expedient for relief against it. The framers of our Constitution, and our law-makers, to their credit be it said, have kept steadily in view the principles of equality and justice, in adopting a system of taxation which commends itself to the favor and approbation of all well-organized minds."

Considering the same question, the Court, in *The Chicago and Northwestern R. R. Co.* vs. *Boone County*, 44th Ills., 242, referring to the case already cited, say: "That case upholds the principles of uniformity of taxation as the central and dominant object in the Constitution in the assessment of taxes, and requires that principle to be carried out, as far as practicable, in respect to all property, without regard to ownership." And again, in the same case, p. 243: "No warrant is given, if the law is not strictly observed, in the case of individuals, and their property is not assessed at its actual value, that the property of a corporation situate in the same county, shall be assessed at a greater proportionate value than that of individuals, even though the enhanced assessment is not on the actual cash value of the property of such corporation—the same rule which is applied to individuals. Justice and the Constitution demand shall be applied to corporations. * * * * * * * * Discrimination is condemned, not only by the Constitution, but by the indignant —yet not less just—judgment of an honest people."

In the case of *Glasgow* vs. *Rouse*, 43 Mo., 400, it is said that the constitutional requirement in

Missouri is, that taxation upon property shall be in proportion to its value, and that this rule "enjoins a uniform rule as to the imposition of taxes upon all property." See to same effect the well reasoned case of *Oliver* vs. *The Washington Mills*, 11 Allen, 272.

Judge Cooley, in his work on Constitutional Limitations, at page 501, asserts that "to compel individuals to contribute money or property to the use of the public, without reference to any common ratio, and without requiring the sum paid by one piece or kind of property or by one person to bear any relation whatever to that paid by another is, it seems to me, to lay a forced contribution, not a tax, duty or impost, within the sense of these terms as applied to the exercise of powers by any enlightened or responsible Government."

Chancellor Kent, (*Kent's Commentaries*, vol. 2, p. 331) declares the fundamental principle which this clause in our Constitution was meant to embody and enforce, to be as follows: "Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all unequal and undue assessments on the part of the government. It is not sufficient that no tax or imposition can be imposed upon the citizens but by their representatives in the Legislature. The citizens are entitled to require that the Legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed."

This cardinal principle of all just governments, we maintain, has been repeatedly declared and enforced in the Constitutions of the several States, in Acts of Congress admitting States to the Union, and by the decisions of Courts of last resort, avoiding or defeating repeated attempts on the

part of State Legislatures to disregard it, and from this principle it will not, in the absence of strong and controlling language to the contrary, be presumed that the people intended to depart in framing the organic law. Again :

The construction insisted upon by petitioner would promote monopolies, and for that reason is not to be favored.

Taxation of the property of corporations, and also of the shares of stock therein, would be to employ the power of taxation to build up monopolies. Says Judge Cooley (Cooley on Taxation, page 173.) "It seems scarcely necessary to say that the rule of equality in taxation will forbid the power being employed for the purpose of building up monopolies. That it is capable of being so employed needs no demonstration." Again, at page 25, the same learned author, discussing the question of taxes on corporate franchises, observes: "These have been a source of large revenue in some States, while others have only placed corporations on the same footing with individuals, and taxed them on their property, or imposed some specific tax intended as an equivalent for a property tax. A tax on a corporate franchise may or may not be just or politic. If the business is one of which corporations have a monopoly, a tax on their franchises, however heavy, would not be burdensome, because the result would only be to add to the cost of whatever the corporations supplied to the public, so that the tax would really be paid by the community at large. If, on the other hand, the business is one open to free competition between corporations and individuals, and in respect to which corporations would enjoy no especial privi-

leges or advantages, a tax upon the privilege of conducting the business under a corporate organization would be wholly unreasonable and unjust, because it would give individuals and partnerships an advantage in the competition ; and their competition, keeping down prices, would prevent corporations from indirectly collecting any portion of the tax from the public, and leave them to bear the whole burden of a demand which, under such circumstances, must prove ruin, while, therefore, a tax on the corporate franchises of banks of issue, which are not subject to competition, might be entirely just, one on the corporate organization of a trading company, with which every individual might compete, would usually be wholly unjust, and if continued, must result in the abandonment of a business, which, under such circumstances, would be carried on at a ruinous disadvantage."

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. A creature of the law it possesses only those properties which the law of its creation confers upon it. These are such as are supposed best calculated to affect the object for which it was created. Among the most important are *immortality*, and if the expression be allowed *individuality*. Properties by which a perpetual succession of many persons is considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies and hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession, with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals is capable of acting for the promotion of the

particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character, than immortality would confer such a power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be.

Chief Justice Marshall, *Dartmouth College* vs. *Woodward*, 4 Wheat., 636.

In *Providence Bank* vs. *Billings*, 4 Pet. 562, the same learned judge says: "The great object of an incorporation is to bestow the character and properties of an individuality upon a collective and changing body of men." Says Mr. Potter (Law of Corporations vol. 1, pp. 11 and 12.) "The existence of corporations in our system of jurisprudence is an established reality, doubtless a necessity. * * * It seems to be the genius and policy of the law through the instrumentality of corporations to promote industry and thrift in different classes of commerce." Again: "It is the experience of the age in which we live, that most of the great enterprises, in the business relations of life, are governed, controlled or stimulated by the instrumentality of corporate association. The three greatest business interests of the age, commerce, including internal improvements, finance and manufactures—have each found the most material advantages, as well as the certainty of success, to flow from associated wealth under the power of incorporations. Indeed, no material interest, requiring the use of capital or the concentration of human energy—no great moral interest intended for the advancement of religion, the diffusion of science or the arts,

but is now aided by the exercise of corporate power. As we have seen it is the policy—the growing policy of State, to give countenance and encouragement to this instrumentality, in the conduct of the various pursuits of life, and to aid in the transactions of the business thereof to such an extent as to enable parties in interest to concentrate both mind and capital in the enterprises intended, and to extend their business with an energy and a success in which individuals would fail by reason of being deficient in material power." (Potter's Law of Corporations—Preface. See also Field on Corporations, Section 15.)

In view of this policy and of these facts, it seems to me, that it is a matter of regret that the framers of our constitution did not abandon the term "corporation" and designate these collective and changing bodies of men under the phrase "Co-operative Associations." The term "corporation" is associated in the untrained mind with Royal prerogative, Royal charters and exclusive privileges, things which are odious to a free people. Even the trained mind too often confounds the corporation which is the creature of general laws and which with its powers and privileges is within the reach of every citizen with that corporation created by Royal prerogative, invested with such powers as Royal pleasure might elect, and which was sold to the highest bidder, or made a gift to favorites. We substituted for the action of ejectment, with all its fictions, an action to recover the possession of real property, with advantages to the legal profession, and to the people. The change directed the minds of men from the form to the substance. We have substituted for the corporations which rested in royal grant and involved monopolies, and exclusive privileges, the corporations resting in general laws, placed within the reach of all, and

which give no exclusive privileges, nor confer any power of monopoly. We have made of them "Co-operative Associations." They exercise no privileges save that of being corporations that any citizen may not exercise. It is sometimes said that they exercise eminent domain, but this is not true. Neither a corporation nor an individual can exercise that great power. The State alone exercises eminent domain—exercises it in the name of the person in charge of the use, whether that person be an artificial (a corporation), or a natural person. Corporation, or no corporation, is not a factor in the determination: the only inquiry is, whether the *use* is one in favor of which eminent domains may be lawfully wielded. When this inquiry is determined in the affirmative, the power may be exercised. It is not a privilege conferred upon any one; but in so far as it may be exercised, is common to all.

Again, it is said that corporations may collect tolls for the use of its property, and this is a privilege not accorded to the individual. If this was true, an answer would be that it is open to citizens to form corporations, and thereby to exercise the same power. But it is not true; the right to take tolls is a franchise which may be conferred upon individuals as well as upon Corporations.

No one corporation has the exclusive right to carry on a given trade, or to embark in a given business to the exclusion of another. The right is common to all. The advantages possessed are not "advantages before the law," but the advantages which money gives, or which business skill and business facilities may afford.

The New York Central Railroad Company possesses no exclusive privilege of carrying passengers or of transporting freight; but in the possession of a well equipped railway, with its four steel tracks, it has an advantage in facili-

ties for transportation which may not be possessed by others; but this is an advantage which does not affect injuriously, but is of benefit to the public. An advantage inherent in its means and facilities, and which is common to all who possess like means and like facilities.

The merchant who does business on one corner with a capital of $20,000, has an advantage over the merchant on the opposite corner who does a business with a capital of only $5,000. Here, again, the advantage flows not from any law, but from means and facilities for doing business, which the one possesses and the other does not, and which enables the former to sell goods cheaper. No injury results to the public; but in the end it may be that the weaker will have to give up his business. Monopolies might result, in this instance, from the laws of trade, were it not that here the principal of co-operation comes in, and enables A, B, C and D, with $5,000 each, to form a partnership, or a corporation, and thus maintain a healthy competition.

The formation of corporations—the aggregation of capital—the application of the co-operative principle enabled companies to extend railroads from the Atlantic seaboard to the grain-fields of the northwest, and thus cheapen the price of bread for mankind. The effect of this was to reduce the profits of mill owners and farmers near the seaboard, and the profits of farmers in Europe, but this resulted from the laws of trade, and was a benefit to the great public; in other words it destroyed the monopolies which farmers and mill owners near the seaboard had, by reason of the favorable situation of their property.

Prior to the construction of the trans-continental railroads, the merchants of San Francisco could

avail themselves of the benefit of monopolies. Corners were made in almost every article of trade, and the necessities of the consumer compelled him to yield to the exorbitant demands of the trader. Co-operation has destroyed these monopolies and again benefited the masses.

But it is said that there is danger to the liberties of the people from the accumulation of wealth. We admit that it is not for the public good that the wealth of a nation should be accumulated in the hands of a few. That such accumulations result in monopolies and in public injury; but the law cannot deal directly with this question. Government cannot lawfully limit the right of acquisition, but it can by wise and judicious legislation guard against its evils. It can invoke the law of co-operation; it may permit the many to combine their capital, and by giving security to such combined capital, can break down monopolies and enable the weak as well as the strong to participate in the blessings that flow from unfettered trade and intercourse. This Government in a Republic, accomplishes, by means of its General Laws, relating to the formation of corporations, for these laws are but recognitions of the advantages of co-operation of the many to resist the aggression of the few. It is the story over of the rods which separated are easily destroyed, but which united cannot be broken.

Our English relatives, swift to profit by American experience, illustrate by their co-operative institutions, organized under liberal laws, the value to society of the modern corporations. The exactions of the middle men, of those who stood as toll gatherers between the producer and the consumer, imposed greater burthens upon the masses of the people than they could well bear, but speedy and adequate relief was found in aggre-

gating the capital of the consumers. To-day it is estimated that one-twentieth of the entire population of England purchase their daily bread and get their shoes, hats, and clothing at the co-operative bakery, flour mill, and retail store. A single Society—the Army and Navy Society—sold goods during the half year ending September, 1880, to the value of £939,266 17s., at a net profit of less than four pence in the pound, almost bringing the producer and consumer together. The capital upon which this business was done is £430,959 14s. 10d., which was contributed and is owned by its thirty-six thousand five hundred and seventeen shareholders. Another Society—the Civil Service Supply Association—operates to the same end, upon a capital of £365,575 4s. 4d. contributed by forty-three hundred and seventy-four shareholders, and twenty-eight thousand eight hundred and thirty-four subscribers. These are but two of the largest out of over one thousand such corporations engaged in supplying to the people of England the best food, clothing, etc., at the lowest prices. Their operation is not only to cheapen the cost of living to the poor, but to induce and encourage habits of industry and thrift on their part. Their operations check by means of the aggregated earnings of the poor, the exactions which would otherwise result from the accumulated capital of the rich. The principle involved in the illustrations given extends to every one of the affairs of trade and commerce, to manufacturing and transportation interests, and can and will under the fostering care of government reform any abuses in either interest. Yet this Court is asked by its judgment in this case to in effect destroy this principle, by declaring that the people have the power and have madly exercised it, to so burden the principle as to render its application an impossibility. How

long would co-operative associations exist if a double burden of taxation was imposed upon the property which they employ in their operations? In whose interest would be such a tax? These are questions pregnant with thought, and to which the answers are so manifest that a statement of them would be superfluous. The poor have the same right to acquire, possess and enjoy manufacturing establishments, banks, railways and steamships as the rich, but there is only one avenue through which they can exercise that right—co-operation; and you are asked to determine that an intelligent people have closed that avenue. Strong indeed would the language have to be in which you could find such an intent.

We shall hereafter see that it is settled law that the joint interest of the co-partner in the property and business of the firm is the substance, of which a certificate issued by the firm to its members, specifying the interests of the respective co-partners, is but the evidence—that the same principle is applicable to corporations. That the interest of each stockholder is an undivided interest in the common property, and that the interest of all the stockholders equals the whole property. (*Atkins* vs. *Gamble*, 42 California, 100.) To tax the property to the corporation and again to the stockholders, is to impose a double burden, which would destroy corporations and prevent co-operation, and promote monopoly, all of which would be in violation of the genius and policy of our Government and laws, which we have seen are "through the instrumentality of corporations to promote industry and thrift." (1 Potter, on Corporations, page 12.)

Says Mr. Justice McKinstry, (*People* vs. *Lynch*, 51 Cal., 26.) "It is not true that we can never hold a law void, unless we find in the Constitution some specific inhibition which, in precise lan-

guage, refers to the particular law. Human ingenuity would fall short of anticipating every possible *mode* by which might be consummated an abuse of Legislative power, which the people in Constitutional Convention desired to guard against. The providence of constitution-makers must find expression in broader terms, but whether restrictions on the legislative power be declared as general and affirmative propositions, or appear as necessary inferences from a comparison of different portions of the Constitution, it is equally the province of the courts to determine whether a particular law falls within any of them;" and again at page 27. "It is not in every case that the courts, before they can set aside the law must be able to find some specific inhibition which has been disregarded, or some express command which had been disobeyed."

Let us suppose we were seeking to overthrow a Revenue law which imposed a burden upon property in violation of the rule of equality and uniformity, in that case we need not to be successful find an express provision of the Constitution requiring that property shall be taxed in proportion to its value. We would look to the taxing power granted, and if it was found in the grant without words of express limitations, we would be bound to read the grant in the light of other provisions of the same Constitution and especially of the Bill of Rights. We would consider the limitations inherent in the power to tax, which limitations by way of definition are carried into the Constitution itself by the use of the term "tax," "taxed" or "taxation." We would consider the nature and purposes of Government and the uses of written Constitutions, and reach conclusions after such consideration, and after a full examination of the constitution in all its parts. These are of the means by which the intent of its framers are

reached, and when that intent is found interpretation is ended. By no such processes can the intent to impose taxation upon any other rule than that of equality and uniformity be worked out of the New Constitution. Indeed we may well ask by what process of reasoning could the intent be discovered in a given provision of the Constitution, to destroy rights, which rights other provisions of the same Constitution declared to be inalienable.

The Constitution of Ohio provides (Constitution of 1851, Sec. 2, Art. 13) that "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, STOCKS, joint stock companies, or otherwise, and also of all real and personal property according to its true value."

It will be seen that the provisions of the Ohio Constitution are much stronger than the similar provisions of our own, yet it was held in Ohio (*Jones* vs. *Davis*, Supreme Court of Ohio, January T. 1880. Reported in Law Reporter, Vol. 10, p. 122,) that where all the property of the corporation was taxed to the corporation the owners of the shares of stock could not be taxed. In that case one Davis was the owner of two hundred shares of the capital stock of the Toledo & Wabash Elevator Company, a corporation organized under the laws of the State of Ohio. All its capital stock was invested in such real and personal estate as was necessary to its business, and the same was listed by the corporation for taxation in 1879, together with all its moneys and credits. In April, in that year, the Board of Equalization of Toledo assumed to add to the return of Davis for that year the sum of $12,000, the alleged value of his 200 shares of stock, and directed the Auditor of Lucas county to levy the proper proportion of taxes thereon for State, county and city purposes. The Common Pleas

enjoined the Auditor from carrying out the directions of the Board. The Supreme Court on writ of error affirmed the judgment upon the grounds above stated.

The petitioner in this proceeding seeks by mandate to compel the Assessor to do precisely what the Supreme Court of Ohio, by injunction, restrained.

The framers of our Constitution never intended the word "stocks" to stand for "shares of stock." They recognized the difference between the two —that the former meant property, and that the latter was descriptive of but an interest in the same property. When they referred to the separate interest in such property, they used the phrase "shares of capital stock," (*vide* section 22, Art. 4, New Constitution), and not the word "stocks."

But there is a broader view to be taken of this question—a higher plane, from which it will now briefly be considered, we maintain:

THIRD. That, if the constitution by express provision did provide for double taxation, such provision would be inoperative and void, because in violation of the fundamental principles of republican government recognized and declared in the Bill of Rights.

"In considering State Constitutions," says Mr. Cooley (Cooley on Const. Lim., pp. 36–37,) we must not commit the mistake of supposing that because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the power of the rulers, but they do not measure the rights of the governed. What is a

Constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, or the origin of private rights; it is not the fountain of law or the incipient state of government, it is not the cause but the consequence of personal and political freedom; it grants no rights to the people, but is a creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it, it is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents."

Referring to the very power involved in this discussion—the power of taxation—Mr. Justice Miller, delivering the opinion of the Court in the case of the *Loan Association* vs. *Topeka*, (20 Wallace, 662) says:

"It must be conceded that there are rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true a despotism of the many, of the majority, if you choose to call

it so, but it is none the less a despotism. It may well be doubted if any man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many." And again (Id. p. 663.): "There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

MR. KNIGHT says: "In our time a French writer has recorded that after attending a debate in the House of Commons, he observed to an English statesman that he had heard no assertion of the general principles of constitutional freedom. The answer was, 'we take that for granted,'" (Knight's England, Vol. 3, p. 417,) and MR. COOLEY, in considering the nature and extent of State Constitutions admits that "many of the most important principles of government are usually not declared at all, but simply taken for granted." (Note 1, Cooley's Const. Lim., p. 41.) In discussing the limitations upon the taxing power he observes (Cooley on Const. Lim., 41): "Vast as is the power of the Government to levy taxes upon its citizens, there are nevertheless limitations upon it of a very distinct and positive character, WHICH INHERE in the very NATURE OF THE POWER ITSELF. Some of these limitations are commonly declared in the written constitutions, but the declaration is rather from abundant caution than from any necessity, AS THE LIMITATIONS ARE EQUALLY IMPERATIVE HEREWITH THUS DECLARED OR NOT."

In Angell & Ames on Corporations (Sec. 436) it is said: "In this country, though the right to impose taxes is inherent in the Legislature, and extends to subordinate communities, as counties, cities, towns, etc., yet it is not admitted to be omnipotent, it being limited and controlled by certain principles that lie at the very foundation of our civil and political institutions. The principle that the right cannot properly exist without representation, was a fundamental ground of the American Revolution. But it is not sufficient that no tax or imposition can be imposed upon the citizens of the United States, unless by their representatives in the Legislature, or by their representatives which constitute the government of a county, town, etc., but every person, natural and corporate, is entitled to require of the lawgivers that taxation be *fair* and *equal* in proportion to the value of his or their property; and no one class of individuals should be unjustly assessed."

Mr. Potter (1 Potter on Law of Corporations, Sec. 217, p. 192): "Whatever limitations exist upon the legislative authority to wield its full scope in the taxing power of the State at its will, MUST BE SOUGHT IN THE NATURE OF THE POWER ITSELF as thus briefly expressed, and in the express or implied restrictions of the National and State Constitutions. Taxation IMPLIES, as we have seen, an imposition for a *public use;* and it also IMPLIES that the imposition shall be upon a system of apportionment, so as to secure uniformity among those who are, or ought to be, subject to the particular tax; and hence we may readily conceive of acts of the Legislature demanding sacrifices of citizens which could not be sustained as legitimate exercises of the taxing power, ALTHOUGH NO SPECIFIC PROVISION OF THE CONSTITUTION SHOULD BE INFRINGED."

In the case of Washington avenue (69 Penn. St. R., 362,) Agnew, J., delivering the opinion of the Court, says:

"There is no case in our books, wherein the legislative power to tax has been maintained with greater vigor and ability than *Sharpless* vs. *The City of Philadelphia*, 9 Harris, yet, even there, the Chief-Justice admits (p. 166) that the exercise of the power may be forbidden by clear implication, as well as express restriction. 'It is not every act the Legislature may choose to call a tax law that is constitutional.' 'The whole public burden,' he contends, 'cannot be thrown upon a single individual, under pretence of taxing him.' This is a concession that taxation has a limit, *per se*, and is not always co-extensive with legislative exaction. When, therefore, the Constitution declares, in the ninth article, that among the *inherent* and *indefeasible* rights of men is that of acquiring, possessing and protecting property—that the people shall be secure in their *possessions*, from *unreasonable* seizures—that no one can be deprived of his *property* unless by the judgment of his peers, or the law of the land; that no man's *property* shall be taken or *applied* to public use without *just compensation* being made; that every man, for an injury to his *lands or goods*, shall have remedy by *due course of law*, and *right* and justice administered without sale, denial or delay; and that no law impairing contracts shall be made; and when the people, to guard against transgressions of the high power delegated by them, declared that these rights are excepted out of the general powers of government, and shall forever remain inviolate, they, for their own safety, stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause.

There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions, that covers it with an ægis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext. Nor is this sanctity incompatible with the taxing power, or that of eminent domain, where for the good of the whole people, burdens may be imposed or property taken.

I admit that where the power to tax is unbounded by any express limit in the Constitution—that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But, nevertheless, taxation *is* bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way of which the legislature may judge, but within the just limits of what is taxation. Like the rain it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights."

In *People* vs. *Mayor of Boooklyn*, (6 Barb., 214), the Court say, "Untrammeled by authorities, a safe and sound rule may be deduced from a few simple and well-settled principles. In the first place it may be assumed as a fundamental principle, in our government and laws, that individuals are protected in the enjoyment of their property,

except so far as it may be taken in two ways, viz: *as a public tax, upon principles of just equality, or for public use, with a just compensation, ascertained according to the provisions of the Constitution.* Secondly, as money is property, every tax or assessment is taking property in some mode, and to be legal must refer to one of the modes above mentioned. Taxes are defined to be 'burdens or charges imposed upon persons or property to raise money for a public purpose.' The right to impose a tax is inherent in every government. * * * We are not, however, to understand that the Legislature is omnipotent on this subject. Its powers are limited and controlled by certain principles which lie at the very foundation of free government. Among these is the principle of just equality. * * * This is the only sense in which a tax is public. The Legislature has not the constitutional authority to exact from a single citizen, or a single town or county or city, the means of defraying the entire expenses of the State. For, if this could be done, the constitutional prohibition would be evaded in all cases, and the Legislature could take private property for public use, without compensation, to any extent, UNDER THE VAGUE AND INDEFINITE PRETENSE OF TAXATION." Again, at page 216, the Court say, "The true rule deducible from sound reasoning, as well as the authorities, is this: *Legitimate taxation is limited to the imposing of burdens or charges, for a public purpose,* EQUALLY, *upon the persons or property within a district known and recognized by law.*" The case above referred to is cited approvingly in *People* vs. *Lynch,* (51 Cal., 20).

Judge Christiancy (*Woodbridge* vs. *The City of Detroit,* 8 Mich., 306), referring to the constitutional provisions, that private property should not be taken for public use without just compensation,

says: "It is true these provisions do not refer to a taking of property in payment of a tax or burden imposed under the taxing power, nor in payment of a debt or other duty to the public. It is doubtless true also, that these prohibitions are primarily aimed against a direct taking of property, to be used in kind by the public, though the language itself makes no such distinction, and the reason why it is properly so construed is, because all the recognized modes of indirect taking, include the idea of compensation. This is the only reason for the construction. The maxim, therefore, applies to these prohibitions, in its full force, that, what cannot be done directly shall not be done indirectly. And, when indirect means are employed to accomplish what is forbidden to be done directly, the law rejects these indirect means, as of no validity, and treats the case as if the same end were obtained by direct means. If this were not so, the whole effect of the prohibition might, in all cases, be evaded with impunity by the simple device of making the process consist of two steps instead of one. And while the Legislature could not authorize the taking of A's land for a public park, they might under the specious name of tax or assessment, raise by the sale of A's land the whole sum necessary to pay B for his land, to be taken for that purpose, * * * and though they cannot take and use your property directly, they may sell it and use the money to purchase other property of the same or any other description."

"It is true that liability to abuse is not always of itself strong evidence of the non-existence of a power, since all legislative and all *human* power is liable to abuse. But the fact that a proposed rule of construction would remove all constitutional restraint, is a very strong evidence that the rule is erroneous." Id. p. 307.

In *Wilkinson* vs. *Leland*, (2 Peters, 627,) Mr. Justice Story held this language: "The fundamental maxims of free Government seem to require that the rights of personal liberty and private property should be held sacred. AT LEAST no Court of Justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and liberty lurked ander any general grant of Legislative authority, *or ought to be inferred from any general expressions of the will of the people.* But the Court must assume, in order to grant the relief prayed for in this proceeding, that such a power lurks in the grant "to tax in proportion to value," and this too when the framers of the Constitution in which this provision is found declared that the rights which this grant is claimed to invade were sacred and inviolable.

In Vermont and in North Carolina it has been held that "altogether aside from any express provision of the Constitution, a Statute taxing property without necessity of a public character, or without compensation in some form, would doubtless be regarded as entirely without the just limits of Legislative power." (*Hatch* vs. *Vermont R. R. Co.*, 25 Vermont, 49; *Railroad Co.* vs. *Davis*, 2 Dev. and Bat., 451.

In New York, prior to the adoption of the Constitution of 1821, there was no provision in the Constitution of that State providnig that private property should not be taken for public use without just compensation, but in a case decided by the Court of Errors, (*Rogers* vs. *Bradshaw*, 20 J. R., 735,) before the adoption of the Constitution of 1821, where the Canal Commissioners had been authorized to take land, but no provision had been made for compensation. It was said, "this equitable and Constitutional right to compensation undoubtedly imposes it

as an absolute duty on the Legislature to make provision for compensation whenever they authorize an interference with private right. (See also *People* vs. *Platt*, 17 J. R., 195; *Bronson's Opinion in Taylor* vs. *Porter*, 4 Hill, 140, and *Powers* vs. *Bergen*, 2 Seld., 358.)

We have seen that there are but two modes by which Government can lawfully take private property; by the exercise of the taxing power or of eminent domain—that the power to tax involves equality and uniformity, and that eminent domain involves compensation. Yet it is here claimed that the article on "Revenue and Taxation" must be construed to require the taking of private property by some other mode, and under some indefinable power involving neither equality, uniformity, nor compensation.

In *Goshen* vs. *Stonington*, (4 Conn., 209,) Hosner J. held that if there should exist a case of direct infraction of vested rights too palpable to be questioned and too unjust to admit of vindication, he could not avoid considering it a violation of the social compact and within the control of the judiciary, although the Constitution had imposed no explicit restraint. He asks, "If a law were made without any cause to deprive a person of his property, or to subject him to imprisonment, who would not question its legality or who would carry it into effect?"

Here it is contended that the Revenue Law of 1881, which is strictly in accord with the usages of free government, and the express sanctions of the Bill of Rights, is unconstitutional by reason of a strained and unwarranted construction sought to be applied to the article on "Revenue and Taxation."

There is no express provision of the Constitution which forbids the taking of private property for private uses; but can it be so taken? would a Statute to that effect be upheld? we answer unequivocally both questions in the negative, and why? Because such a Statute would violate the fundamental principles of free Government as declared in the Bill of Rights. Would the Courts, in determining whether such Legislative power existed under the Constitution, confine its examination to a single section of that instrument, or infer the existence of the power from any general language in such section? we say no; that the language, whatever it might be, must be interpreted in the light of principles embodied in the Bill of Rights, and which lie at the foundation of the social compact.

The power of Government to exact from one person, or one corporation, a contribution for the support of the Government, at a greater ratio, in proportion to his or its property, than it exacts from another, cannot be found in the power to tax. Such an exaction, by whatever name it may be called, or in whatever form it may be clothed, would not be a tax, but would be the taking of private property for public use, which could not be done without the consent of the owner, or without retribution of the value in money. The exercise of such a power is contrary to the fundamental principles of Republican Government. The people of this State did not intend to exercise such a power, nor was it competent for them to do so, had that been their intention.

The power which they conferred upon the Legislature, was conferred under the very designation of "revenue and taxation;" and in the same instrument they guarded the citizen from spoliation and confiscation by express declarations that he had certain inalienable rights, which rested upon

sanctions more sacred than constitutional guaranties.

These rights are referred to in Secs. 1, 14, 21 and 23, of Art. I, of the State Constitution, in terms as follows :

SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

SEC. 14. Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into Court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a Court of record, as shall be prescribed by law.

SEC. 21. No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

SEC. 23. This enumeration of rights shall not be construed to impair or deny others retained by the people.

It will thus be seen that the right of the citizen to his property is secured by guarantees as many and as high as his right to his liberty or to his life. The

constitution recognized the inviolability of private property, and wisely so, since few interests take a deeper hold on man than those which relate to property, much of the general prosperity and much of the unexampled activity, energy and enterprise which distinguish the present era, is due to the all prevailing conviction that private property is secure.—(Dillon, C. J., in Hanson vs. Vernon, 27 Iowa, 42.

These rights, which are beyond the reach of government and of the people, are strongly and aptly stated in sections 2 and 3 of the Bill of Rights of the Kentucky constitutions of 1799 and 1850:

SEC. 2. That absolute, arbitrary power over the lives, liberty and property of freemen, exists nowhere in a Republic—not even in the largest majority.

SEC. 3. The right of property is before and higher than any constitutional sanction.

We have seen that equality and uniformity are of the very essence of taxation—Cooley, on taxation, 495—That the power to tax is the power to exact from the citizen his share toward the support of the Government.

Taxes are in effect as MR. MILL contends—sacrifices made for the public good, EQUALITY OF SACRIFICE being the rule.—(2 Pol. Econ. 370, 372.) "Taxation cannot be arbitrary, because its very definition includes apportionment." (Cooley Const. Lim., p. 175).

In *People* vs. *Lynch* (51 Cal. 20), a leading case, Justice McKinstry, speaking for the Court, says: "An assessment for a local improvement is a *tax* differing from other taxes, in that it need not be levied upon the *ad valorem* principle. Although

such assessment is not prohibited by that clause of the State Constitution which provides that "all property shall be taxed in proportion to its value," it is of the VERY ESSENCE OF TAXATION, *in every form*, that it be levied with equality and uniformity, and to this end there should be some system of apportionment. (*Taylor* vs. *Palmer*, 31 Cal. 241.) * * * Whatever the basis of taxation the requirement is that it shall be uniform. * * The terms "tax" and "assessment" * * both include the idea of some ratio or rule of apportionment, so that of the whole sum to be raised, the part paid by one piece of property shall have some known relation to or be affected by that paid by another."

At and before the time the constitution was framed the word "tax" had in the connection in which it is used a popular and legal signification, which was well understood. This definition included equality and uniformity as factors, and this definition *ex vi termini* describes the power and defines with precision its limitations. Before the decision in *People* vs. *Lynch* our courts had often considered the power of assessment, but instead of going to the centre of the thing itself had stuck in the bark, and left the subject in as much confusion as they found it. In the *People* vs. *Lynch* a principle was enunciated—plain and simple—that it was of the "very essence of taxation in *every form*, that it be levied with equality and uniformity." From the day that the opinion was published, to this, the authority of that case has never been questioned. It may not be going too far to say that but few decisions have been received by the bar and by enlightened public opinion with the same approval which has been accorded to that. Let it be borne in mind during this discussion that in the *People* vs. *Lynch*

it was held that the power of "assessment" was not limited by the express provisions of the Constitution that "taxation should be equal and uniform," but that the Court found the limitation inherent in the power itself.

Let us now apply the principles deducible from that case to the case at bar. The power which the petitioner invokes is the power to tax. The power to tax is the power to impose public burdens upon property by some rule of equality and uniformity. The burden sought to be imposed by this proceeding, as we shall hereafter see, violates the rule of equality and uniformity. Hence the power to impose it does not nor cannot rest within the power of taxation, and the case cited is conclusive of this.

The learned Justice who delivered the opinion in that case is not unmindful of the fact that its approval rested upon the ground that it was a clear enunciation of a great principle fundamental in free government—the authoritative statement of which by a court of last resort for a time restored to the people confidence in the security of property. That confidence was based upon the fact that the Court considered there was a barrier between taxation and spoliation, and would wield its vast power to preserve intact that barrier.

Let us for a moment consider the widespread disaster which resulted from what we claim to be a violation of the fundamental principles of free government by a co-ordinate department of State. Not for the purpose of proving the existence of the principle contended for, but to impress upon the Court the gravity of the question here involved, and the importance of bringing to its consideration the best and most deliberate judgment. It is entirely safe to estimate the value of all the property in this city, before the late financial disturbances, at four hundred millions of dollars, and

that these values have been impaired at least 25 per cent.—that fully one-half of this great loss may be traced directly to the Revenue Law of 1880, based, as it was, upon the false theory that the New Constitution was an attack upon property—that it had broken down all the barriers between taxation and spoliation, and had destroyed the sanctions with which property rights had hitherto been invested. That it not only permitted but required that the burdens of taxation should be unequally distributed. I say false theory, because I have endeavored in this argument to prove, to the end that the Court in this case may so declare, that the New Constitution does recognize and protect (and that it could not do otherwise) the very rights which a majority of the Legislature of 1879-80 supposed it was intended to destroy. The principle of the Revenue Act of 1880 was that equality and uniformity was not of the essence of taxation. That the burdens of government could be at the will of the majority imposed upon property, in defiance of any uniform rule of apportionment based upon values. The enactment of a law embodying such a principle was but a declaration by the legislative department of the State that Government recognized no rights as beyond its control, but held the property of citizens subject to its absolute disposition. Is it strange that after such a declaration fear took the place of security, or was it remarkable that values should shrink after the Legislature, in so far as it could do so, had, for the Constitutional doctrine of security to property, substituted

"The good old rule, the simple plan,
That they shall take who have the power,
And they shall keep who can."

Is it not safe to say that no act ever passed by an American Legislature has been so disastrous. It took from the people of San Francisco alone not

less than fifty millions of dollars, or what is the same thing, if not worse, it impaired the value of their property to that extent—a sum greater than the State, during the thirty years of its existence, has taken from the people by way of taxation to maintain the government, to erect its public buildings, to support its criminals, to care for its infirm, to feed and clothe its orphans, and to educate its children; nor have its exactions stopped here; it has restrained trade and commerce; the merchant would not buy, for he knew not whether he should control that which he purchased; importations have been limited to the strictest necessities, and the prolific harvests of our fields lie useless in the warehouse, because trade brings no ships in which they may be carried to the markets of the world. It has prevented immigration; it has tarnished the fair name of California; it has impaired faith and confidence in government; it has brought to the bar of this Court and forced upon the consciences of its justices a question so momentous—that it is not exaggeration to say that the words in which they shall answer it will restore the public confidence in government, or may constitute the funeral service at the grave of public prosperity.

You cannot, under the pretense of taxation, take from any one more than his share. To do that would be to trench upon the power of eminent domain, under which more than his share could be taken. But even then the great principle of equality and uniformity is preserved by making compensation from a fund raised by an equal and uniform tax. The Kentucky Constitution of 1799 granted to the Legislature the taxing power, without limitation, other than the limitations under our form of government, inherent in the power itself. In other words, the people of the State of Kentucky conferred upon

the Legislature every power of taxation which the people themselves might exercise in their original capacity. The grant was of all legislative power, without limitation, save such limitations as existed independent of constitutional sanction. More than a quarter of a century ago the Court of Appeals of that State, then composed of three of its most eminent jurists, Hon. George Robertson, Hon. Ephraim M. Ewing, and Hon. Thomas A. Marshall, was called upon to define this power, and of the results reached in their deliberations. Judge Cooley—Cooley on Taxation, 177—says: "The principles by which the legislative apportionment of taxes is to be tested, have been so admirably stated, that we prefer quoting the language of the Court, in preference to any attempt at stating them in our own language." A just tribute from a great jurist to the judgment of a learned Court.

The case referred to was *Lexington* vs. *McQuillan's Heirs*, 9 Dana, 513–516.

The Court say (Judge Robertson, one of the first and most accomplished lawyers of his day, delivering the opinion of the Court): "When shall a tax be levied? To what amount? Shall it be a capitation or property tax? Direct or indirect? Ad valorem or specific? And what classes of property are the fittest subjects of taxation? Are all questions wisely confided by our Constitution to the discretion of the legislative department, subject to no other limitation than that of the moral influence of public virtue or responsibility to public opinion. But in some other respects, and so far as the power of taxation may be effectual being thus limited, it is in our opinion limited by some of the declared ends and principles of the fundamental laws. Among these political ends and principles, equality, as far as practicable, and security of property against irresponsible

power, are eminently conspicuous in our State Constitution. An exact equalization of the burdens of taxation is unattainable and Utopian, but still there are well-defined limits within which the practical equality of the Constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal, but it must be general and uniform; hence, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and if a tax be laid on land, no land within the limits of the State can be constitutionally exempted, unless the owner be entitled to such immunity on the ground of public service. The Legislature, in the plenitude of the taxing power, CANNOT have constitutional authority to exact from one citizen, or even from one county, the entire revenue for the whole commonwealth. Such an exaction, by whatever name the Legislature might choose to call it, would not be a tax, but would be undoubtedly, the taking of private property for public use, and which could not be done constitutionally, without the consent of the owner or owners, or without retribution of the value in money.

The distinction between constitutional taxation and the taking of private property for public use by legislative will may not be definable with perfect precision, but we are clearly of the opinion that whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituent members of the same community generally as own the same kind of property.

Taxation and representation go together, and representative responsibility is one of the chief conservative principles in our form of government. When taxes are levied, therefore they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible. And although there may be a discrimination in the subjects of taxation, still persons in the same class, and property of the same kind, must generally be subjected alike to the same common burden. This alone is taxation according to our notion of constitutional taxation in Kentucky. And this idea, fortified by the spirit of our constitution, is, in our judgment, confirmed by so much of the twelfth section of the tenth article as declares "nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

This decision has stood the test of time, and has met the approval of the most enlightened commentators upon our governmental system.

The principles enunciated are but the echoes of the Declaration of Independence, proclaiming the equality of all before the law and the existence of inalienable rights "to secure which governments are instituted among men." Principles placed beyond the attacks of States by the declaration of the 14th amendment of the Federal Constitution, "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," principles which constitute the corner-stone of a free government, and from which it cannot depart without making rebellion to its laws a freeman's right, and revolution a people's duty.

"All property shall be taxed in proportion to

its value;" upon this rule hangs the law and the gospel of taxation.

"All property shall be taxed in proportion to its value;" how simple the rule! how easy its application! how just and beneficent its operation!

"All property shall be taxed in proportion to its value;" this line marks the limit of the power which rests in the people, or which can be delegated to any government within the boundaries of the Republic; within that limit are peace, order, security and all just governmental powers; without are turmoil, confusion, spoliation and anarchy.

"All property shall be taxed in proportion to its value;" to this test must come every revenue law, whether such law rests alone upon legislative action or sounds in constitutional enactment. If it fail to meet this test, reason, principle and authority, the trinity of the law, unite in the judgment that it is not the exercise of the lawful power of taxation, but that it is the exercise of the unlawful power of confiscation.

If every person in the land should agree that contributions might be exacted from property for the support of the government by any other rule than that of equality and uniformity—if by unanimous consent the power to impose such burdens unequally was attempted to be conferred upon government, such rule could not be lawfully enforced nor such power lawfully exercised. The rule and the power would invade the domain of inalienable rights. No one can surrender that which is not his own. The inalienable rights which exist independently of constitutional sanctions are not the property of this generation. They are the heritage of peoples yet to be, and we are but the trustees of that heritage clothed with the limited right of present use and enjoyment, and charged with its defense and maintenance to the

end that we may transmit it unimpaired to the rightful heirs.

The power of taxation is the only power which the petitioner does, or can invoke to sustain this proceeding. But we have seen that there is a limitation inherent in the power to tax, namely, that when taxes are levied upon property they must be apportioned with reference to a uniform standard—must be laid by some rule of equality and uniformity—otherwise they would degenerate into mere arbitrary exactions, and such an exaction by whatever name the Legislature might choose to call it would not be a tax, but would undoubtedly be the taking of private property for public use without just compensation. This limitation finds a resting place in the fundamental principles which underlie our republican form of government, and, therefore, cannot lawfully be removed either by the Government or by the People, "The right of property is before and higher than any constitutional sanction" and "arbitrary power over it exists nowhere in a republic."

FOURTH. THE TAXATION OF ALL THE PROPERTY OF A CORPORATION TO THE CORPORATION, AND THEN THE TAXATION OF THE SHARES OF THE CAPITAL STOCK TO SHAREHOLDERS, IS DOUBLE TAXATION.

Now, having heretofore to some extent made an inquiry into the general nature of corporations under our laws, and of the interests and rights which the stockholders have in the corporate property, we come to the precise question stated, viz: that the taxation of the shares of capital stock to shareholders, and then the taxation of the property to the corporation would be double taxation.

Mr. Cooley, in his work on taxation, in considering the forms upon which taxes are imposed upon corporations, uses the following language, pp. 392 and 393: "Taxes on corporations. These are imposed in so many forms that an enumeration is difficult. The following may be mentioned:

1. A specific tax on the franchise.
2. A tax on the property by valuation.
3. A tax on the capital stock.
4. A tax on the business done.
5. A tax on dividends or on profits.

Sometimes the franchise is taxed, and also the capital stock or the property; but to tax the capital stock and also the property in which the capital is invested, would be imposing the same burden twice on the same property, and consequently unjust, if not illegal."

Napton, J., delivering the opinion of the Court in the Hannibal & St. Joseph R. R. Co. vs. Shaklett, 30 Missouri, 558, uses this language: "Capital stock, in its strict signification, exists only nominally; the money or property which it represents is the tangible reality. The one is the representative of the other; and if the stock and the property it represents are both taxed, the taxation is double." And again, at p. 560, he observes: "A double taxation is an absurdity—at least, where the proceeds of the tax go in one direction, since it is in effect an increased rate of taxation merely, and could be more plainly and simply expressed by making it so in terms."

In Smith vs. The Town of Exeter, 37 New Hampshire, the question is thoroughly discussed. Perley, Ch. J., delivering the opinion, and speaking for the Court, p. 558, says: "By the laws of Illinois, which are made part of this case, all pro-

perty of railroad corporations is taxed to the respective corporations at the actual value, in the same manner as in the case of individuals; and the property of this road was actually appraised and taxed according to those laws, in the year 1857, and more than $50,000 of the taxes assessed on the road that year was paid before April 10, 1857. The whole property of the railroad belongs to the stockholders, who own the road in shares; and whatever is paid by the corporation, is, of course, paid out of the property thus held on shares, and is deducted from the property or income of the shareholders. The tax on the corporation is, therefore, in substance, a tax on the shares and on the shareholders. The property of the road consists of the stock, and a tax on the road is in substance a tax on the stock.

By our statute, "stock in any corporation out of this State," is liable to be taxed here as personal property, "if not there assessed." The question in this case is, whether, to exempt the corporate property from taxation here, it is necessary that it should be taxed as stock to the individual stockholder in the foreign jurisdiction; or if it is sufficient if the stock actually pays a fair and full tax through a general assessment made on the corporation; and we think that if the stock actually pays a full tax in the State where the corporation and the corporate property are situated, though the payment is made through a general assessment on the corporation, that it is not liable to be taxed in this State to the stockholder residing here.

A citizen in this State has a right to invest his money in land or other property situated abroad, and liable to be taxed there. If it is actually taxed there, the principle of the statute exempts it from a double taxation by assessment to the owner, who resides in this State. If it does not bear the burden of taxation in the State where it is

situated, and is in the stock of a corporation, it is taxable here as personal property, though the corporate property may be land, or affixed to land, as in the case of a railroad. In this case the property of the railroad in fact and substance, paid a full tax in Illinois, where it was situated, according to the laws of that State, and was, we think, stock assessed where the corporation was situated, within the meaning of our statute."

In the case of the *Rome R. R. Co.* vs. *The Mayor and Common Council of Rome*, 14 Georgia, 276, the Court say: "The tax imposed by the city of Rome was upon the *property* of the Railroad Company. It was not upon the capital stock, nor was the assessment according to the rate at which banks were taxed at the time that the charter was granted. That charter provides: That the stock of said company shall not be liable to any tax, duty, or imposition whatever, unless such and no more as is now in banks of this State." See Act in Pamphlet of 1839.

This clause, literally, is unintelligible. What tax, duty or imposition was in banks in Georgia at that time we have no means of knowing, and if we did know, it would be a curious criterion for taxing railroads. There is an omission. Doubtless the Legislature intended to say that the stock of that company would not be liable to a tax, except such tax as is now imposed upon the stock of banks in this State; so we interpret the clause.

Now, by this clause, the capital stock of this railroad is protected from taxation, except in a given rate—that is, as bank stock was then taxable. It is conceded that the property taxed is such only as is necessary to conduct the business of the railroad company. It is, therefore, a part of its capital stock, and as such not taxable as

property by the Rome corporation, upon an assessment different from that according to which bank stock was taxable."

In *Salem Iron Factory* vs. *The Inhabitants of Danver*, 10 Mass., 516, it is said: "'Shares in any incorporated companies possessing taxable property'" are expressly mentioned in some of the tax acts, and are manifestly included in all of them. Among the articles of personal estate for which the owners are taxable in their respective towns. This being the case it appears unjust, and contrary to the spirit of our laws, that the corporation should also be taxed for the same property."

Smith vs. *Burley*, 9th New Hampshire, 423, was a case against the Selectmen of Exeter for illegally assessing the plaintiff for certain shares owned by him in the Phœnix Factory, so-called, being a corporation for the manufacture of cotton goods in Peterborough, in that State. All the property of the corporation, real and personal, was taxed to the corporation in Peterborough. It was agreed that the plaintiff was the owner of the shares, and that the tax was duly assessed; that the plaintiff, who resided in Exeter, was liable to be taxed there for that property. The revenue law then in force provided for the taxation of the property, and also for the taxation of the shares of stock.

The Court said that the language was broad enough to include the shares as subjects of taxation to the owner, if such was the intention of the Legislature, "but we can not for a moment suppose that such an intention existed, unless we can find that the provisions of the Act of 1827 for taxing property to the corporation is not in

force, "for," say the Court, "if that still stands, a taxation of the shares at their appraised value would in fact become a double taxation of the property—once to the corporation itself, and then to the corporators, which would be unjust, oppressive and unconstitutional."

The only express limitation upon the taxing power contained in the Constitution of New Hampshire is found in Part 2 thereof, which confers upon the General Court power to impose and levy proportional taxes upon all estates within the State. This is, in substance, the provision of our own Constitution, and therefore the case of *Smith* vs. *Burley*, *supra*, is upon all fours with the case at bar.

Webster defines the word "stocks" as follows: "A fund; capital; the money or goods employed in trade, manufactures, insurance, banking, &c.; as, the stock of a banking company; the stock employed in the manufacture of cotton, in making insurance, and the like; stock may be individual or joint."

Mr. Abbott, in his Law Dictionary, gives the following definition: "The property of a business corporation, kept and used to enable it to carry on its business, is called its stock, and is usually treated and dealt in as if divided into shares, represented by certificates setting forth the ownership, and transferable by entries and recorded in the books of the company, such as the transfer book, the stock ledger, &c. The owner of a share or shares is called a stockholder—a term not minutely accurate, for what he holds is a certificate; as to the stock, he is an owner rather than a holder.

"Stock of moneyed or joint stock corporations is properly defined to be "the money or capital invested in the corporate business," the evidence of which is furnished to each corporator in the

form of certificates duly authenticated by the officers of the corporation under their corporate seal." (1 Potter Law of Corp., Sec. 254, p. 326. Field on Corporations, Sec. 123, p. 138. Pierce on Railroads, p. 110.)

It may be said that the actual value of shares of stock may at times exceed the value of the corporate property. This can never be the case, for the corporate property includes its franchise. The provisions of the Codes under consideration declare—Political Code, Section 3608, "that all property belonging to corporations shall be assessed and taxed," and Subdivision 1 of Section 3617, of the same Code, declares that the term property includes among other things the franchise.

A tax upon the market value of the capital stock of a corporation over and above the value of its real and personal property, is a tax upon the franchise, and to tax that excess of value and the franchise would, of course be double taxation. (Cooley on Taxation, 168, *Commonwealth* vs. *Lowell Gas Co.*, 12 Allen, 76; *Commonwealth* vs. *Hamilton Manufacturing Co.*, 12 Allen, 301; *Commonwealth* vs. *The People's Five Cent Savings Bank*, 5 Allen, 43, 431.)

But we need not consider this question, because the rule which petitioner invokes would require the shares to be taxed at the value of all the property of the corporation, including its franchise, to the shareholder, and then the property of the corporation, including its franchise, to the corporation.

The question whether the taxation of all the property of the corporation to the corporation, and then the taxation of the shares of stock to the shareholders is double taxation, was ably considered and determined in the *State* vs. *Branin*, 3 Zabriskie, New J. R., 485.

The case was a *certiorari*, prosecuted by Benjamin Fish in the name of the State, and directed to Branin, collector of the first ward in the city of Trenton. In the assessment of tax against Fish for the year 1851, were included 213 shares of the Delaware & Raritan Canal, and Camden and Amboy R. R. stock, valued at $133 per share.

The Delaware and Raritan Canal Co. was chartered by an act of the Legislature passed Feb. 4th, 1830, which provided that the sum of 8 cents for each passenger and the sum of 8 cents for each and every ton of merchandise transported thereon excepting the articles of coal, lumber, lime and ashes, and similar low-priced articles, for which two cents per ton should be paid to the Treasurer of the State, and that "no other tax or impost shall be levied or assessed upon the said company." And in the charter of the Camden and Amboy Railroad and Transportation Company, passed on the same day, was a similar provision for the payment to the State Treasury of a duty of ten cents per passenger, and fifteen cents per ton for merchandise transported thereon; and also a similar exemption. That the property of these companies —that is, the canal and railroad company, the lands upon which they are located, and their appurtenances—were exempted from taxation by the provisions of their respective charters, was not an open question.

This was conceded on the part of the defendants *in certiorari*, but it was claimed by them that the tax under consideration was not on the property of the companies, but on the shares of the capital stock of the companies, which it was claimed was the property of the individual stockholder. It was contended that these shares were not within the terms or intention of the exempting clauses in the charter.

The fourth section of the supplement to the Act concerning taxes, passed March 4th, 1851, declared that public stocks and stocks in corporations, whether within or without this State, were the subject of taxation.

In discussing the question involved, Chief Justice Halstead delivering the opinion and speaking for the Court, says:

"If the stock of these companies is within the exemption contained in their charters, it is of no consequence what the true construction of the provisions of the supplement of 1851 may be. These charters are in the nature of executed contracts, which the Legislature have no constitutional power to alter or impair." *Fletcher* vs. *Peck*, 6 Cranch, 87; *State of New Jersey* vs. *Wilson*, 7 Cranch, 164; *Terrett et al.* vs. *Taylor et al.*, 9 Cranch, 50; *Dartmouth College* vs. *Woodward*, 4 Wheat., 518; *Green et al.* vs. *Biddle*, 8 Wheat., 1; *Providence Bank* vs. *Billings et al.*, 4 Peters, 514. The first question, therefore, is whether the clauses in the charters of these companies, which declare that "no other tax or impost shall be levied or assessed upon the said company," exempt from taxation, the stock of the companies in the hands of the stockholders, or only the property of the companies in the hands of the corporation."

It is settled that, by the provisions of the contract, the property of the companies is exempt: a tax upon the business done by the companies is paid in lieu of a tax upon their property. In this way, the joint companies already pay a very large sum annually to the State. For the first time, in 1851, the stock of incorporated companies is made taxable, and the question is thus brought up. The companies are still bound by their contract to pay to the State the transit duties, the tax upon their business, and the State is equally bound by its

contract to exempt them from other taxation. Are the stockholders of these companies now liable to pay tax upon their *stock?* If they are, the exemption clauses were not worth the paper upon which they were written. So much of the property of every incorporated company in the State as is represented by the capital stock, is exempted in the Act of 1851, where the stock is taxed in the hands of the stockholders.

It could not be otherwise without imposing double taxation. To tax the property and tax the stock is, in effect, to tax the same thing twice over. The stock is the representative of the property; the certificate of stock only evidence of title to the property, and worthless except as such evidence; and a tax upon the stock is, in fact, a tax upon the property it represents.

I am unable, therefore, to yield my assent to the course of reasoning by which it is sought to be established, that the State, having exempted the property of the companies from taxation by the express terms of the contract, and for a consideration of great value, can now tax the share which each member of the company holds of this very property. True, a corporation is an artificial person, a legal fiction created by the law, and its members or shareholders are real persons; they are not the same in personal identity. But the property is the same, whether considered as in the hands of the corporation or the corporators; and it is the *property*, not the person, which is the subject of exemption.

If the property of the company is taxed, who pays the tax? Undoubtedly the members, the holders of the stock. If that property is exempted from taxation, who has the benefit of the exemption? Certainly the stockholders. It is, to be sure, one thing to take the stockholders' money from the treasury before it is divided, and another

thing to take it from their pockets after it has been divided; and this is precisely the difference, and the only real difference, between taxing the company and taxing the stock. The contract was, that no tax should be assessed upon the companies; that is, upon the property of the companies, other than the transit duties. This is not disputed. To tax the property of the companies as the property of the companies would be a violation of the contract. This is not disputed. How, then, can it be that to tax each member's share of the property in his hands under the denomination of the stock, is not a violation of the plain meaning, the manifest intention, of the contract? Is it not doing precisely the same thing, in a different way?"

In Angell & Ames on Corporations, it is said, (Sec. 460), "The cases cited in the preceding section" (Massachusetts and New York cases) "are of importance in recognizing the rule that the property of a corporation is not to be *twice* taxed. In Boston *Water-Power Company* vs. *The City of Boston*, (9 Met., 199) the Court were of the opinion that the corporation was not liable to be taxed for personal estate, or income, inasmuch as the whole value of its personal property was included in the *shares* of stock and as such, were liable to be taxed to the holders of the shares *eo nomine*. On the other hand, by the tax laws of New Hampshire, the property of corporations is made taxable to the corporations, in the town where the property is situated, and accordingly, no authority exists to tax the stock in corporations to the owner of the shares, though living in a different town. A taxation of shares, at their appraised value, it was therefore held, 'would, in fact, be *double taxation;* once to the corporation itself, and again to the corporators,

which would be unjust, oppressive and *unconstitutional.*' And again, (see p. 460), in summing up on the question, it is said, 'It appears, then, that the capital stock of a corporation, may, in the discretion of the Legislature, be taxed as an aggregate, to the corporation according to its value, or to the stockholders, on account of their separate ownership of it, but cannot be taxed at the same time in both modes.'" Certificates of stock are merely muniments of title and evidence of the holder's right and title to the specified number of shares in the property and franchise of the corporation. (1 Potter's Law of Corp., sec. 262, p. 334; Field on Corporations, sec. 130, p. 144; Angell & Ames on Corporations, sec. 561; Pierce on Railroads, p. 79.

The original subscribers contribute the capital invested, and they and their successors are always, in equity, the owners of that capital, though the legal title is vested in the corporation itself, impressed with the trusts prescribed in the charter. (2 Potter's Law of Corp., sec. 555, p. 673.) "The only possession the holder has is the certificate, which is merely the evidence of his interest, AS TITLE DEEDS ARE OF TITLES TO LAND. (Field on Corporations, sec. 128, p. 143).

And in laying down the rules of law which are to govern in such relations, we should avoid a system of distinctive technicalities; rules should be founded in the same principles of justice which are recognized in other and analogous dealings among men. (Id. p. 673).

If A should convey his property to B, in trust, to hold the legal title to some specific use, would it be contended that additional property had been created? Would it be for a moment contended that the property should be taxed at its full value to A and also to B? Is it not clear, then, in this instance, that when the property is taxed, either

to A or to B, that all the property involved is taxed.

The Supreme Court of the State of California by its reasoning in the well-considered case of *Atkins* vs. *Gamble*, 42 Cal., p. 86, it seems to us, has disposed of the whole question, and has laid down a principle which must be applied to this case, and which is decisive thereof. The Court says, pp. 98, 99, 100:

"There can be no doubt as to the general proposition that, if the bailee of personal property sell it in violation of his authority, the owner may ratify the transaction and demand the proceeds of the sale. If A intrusts to B a steamboat, for sale at a limited price, and if B, in violation of his duty, sell it for a less price, A may acquiesce in the sale and demand the proceeds. This proposition needs no argument or citation of authority to sustain it. It would not be at the option of the bailee whether he would account for the proceeds or deliver another steamboat of equal value, nor would it be any defense for him to say that he, at all times, had and held another steamboat of equal value, which he was ready to deliver instead of the first.

"If certificates of stock in mining corporations are to be treated in this respect as other personal property, it is evident the defendant became liable to the plaintiff for the proceeds of the ten shares sold to Martin.

"But we think such certificates stand upon a different footing. Whilst stock in corporations is denominated personal property, and is subject to seizure and sale under execution, and whilst a particular certificate may be capable of complete indentification, by the members or otherwise, the certificate is but the evidence that the holder of it is entitled to an undivided share in the assets and business of the corporation. The stockholders are the

joint owners of the franchise and property of the corporation, each being entitled to an undivided share thereof, and the only office of the certificate is to furnish the evidence of the *quantum* of interest held by the owner of the certificate. 'Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member.' (*Mechanics' Bank* vs. *New York and New Haven Railroad Company*, 13 N. Y. R., 126.)

"If a firm, doing business as an ordinary partnership, issue certificates to each of its members, specifying the interests of the respective co-partners, such certificates would have no intrinsic value, except as evidence of the *quantum* of interest of each co-partner. The joint interest of the co-partner in the property and business of the firm is the substance of the existence of which the certificate is but the evidence. If, for example, there be three co-partners, each owning an undivided interest of one third, there is no appreciable difference between the respective interests. They are in all respects precisely similar, and each several interest is an exact duplicate of the others. The same principle is applicable to corporations. The holder of ten shares of stock stands precisely upon the same footing as any other holder of ten shares. Their interests are precisely similar, and of the same value, and each holds but an undivided interest in the common property. This proposition is not new in this Court, and is substantially decided in *Hawley* vs. *Brummagim*, 33 Cal., 394; *Hardenburg* vs. *Bacon*, 33 Cal., 356."

"Stock is one thing and certificates is another. The former is the substance, the latter is the evi-

dence of it." (*Hawley* vs. *Brumagim*, 33 Cal., 399.)

Let us for a moment assume that the effect of including the word "stocks" in the constitutional definition of property is to require the taxation of stocks, and then inquire whether, by such assumption, the cause of the petitioner is advanced? The law of 1881 requires all the property of a corporation, including its franchise, to be taxed. In this, the supposed mandate of the Constitution would be fully executed. The "substance" is taxed; the petitioner is but pursuing the "shadow."

"*Double taxation is an absurdity.*" Napton, J. (30 Mo. 560.)

At ten o'clock A. M., on the first Monday in March, A, B and C, form a corporation for the purpose of purchasing, holding and disposing of a certain house and lot on Van Ness avenue. The value of the house and lot is $24,000. At 11 A. M. the corporation purchases the property. At 12.30 P. M. the assessor lists the property to the corporation, and assesses it at $24,000. According to the theory of petitioner he must then list to the shareholders their shares in the corporation and assess them at $24,000, making a total assessment of $48,000. Prior to the first Monday in the following March the corporation make a gift of the property to an individual, and it is next assessed for only $24,000. Is it not clear that there never was but $24,000 of taxable values? Is not the principle involved in such taxation the principle that the Legislature must lawfully impose upon the property of X a tax at the rate of one *per centum* on its value, and at the same time and upon like property of Y a tax at the rate of two *per centum* on its value!

A principle at variance with any theory of taxation authorized by free governments. *It would not be taxation at all but would be confiscation.*

FIFTH. THAT THE RELATION OF DEBTOR AND CREDITOR DOES NOT EXIST BETWEEN A SAVINGS AND LOAN SOCIETY AND ITS DEPOSITORS.

This point arises because the petitioner challenges the validity of the provisions of subdivision sixth of section 3,617 of the Political Code, which is that "claims * * accruing for or on account of money deposited with savings and loan corporations, shall, for the purpose of taxation, be deemed and treated as an interest in the property of such corporation, and shall not be assessed to the * * * owner thereof."

It is claimed that the provision in question exempts from taxation the credit which the depositor holds against the association.

It is contended that the transaction between the depositor and the bank is a loan, and that it must be treated in the same manner as a like transaction would be treated if it had been between a depositor and a commercial bank.

To determine whether this be so or not requires an examination of the laws under which savings and loan associations exist in this State, and of the nature and purposes of such corporations.

The purpose is declared (Civil Code, sec. 517) to be that "of accumulating and loaning the funds of their members, stockholders and depositors." Here we find the purpose declared to be in the nature of a trust—they are not to loan their own money, but the money of their depositors. In section 572 of the same code the property is treated as the property of the depositors and not as the property of the corporation. Its certificates of deposit are not negotiable instruments. (Section 566, Civil Code). The corporation may not without limitation prescribe the time and conditions of repayment. The limitation

upon this power is that whenever there is a call by depositors for repayment to a greater amount than there are funds on hand, the calls shall be registered, and loans and investments of the *funds of depositors* must cease until such calls are satisfied. (Civil Code, section 577.) Receiving deposits must not be treated as the creation of debts within the meaning of the general law which forbids corporations to create debts in excess of the amount of capital stock paid in. (Civil Code, sections 309 and 579.)

A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed. (Civil Code, section 1912.) It is presumed to be made upon interest unless it is otherwise stipulated at the time, in writing, (Civil Code, section 1914, Am'd of 1874), and unless there is a contract in writing fixing a different rate, interest is payable at the rate of seven per cent. per annum. (Civil Code, section 1917, Amend. 1878).

So far from the transaction between the depositor and the Savings & Loan Society, constituting a loan, it seems plain that such corporation has no power to receive a loan. The contract which the law implies from a loan of money is not one which the corporation could lawfully make, and if attempted would be *ultra vires*.

"Unlike the property of other banks and moneyed corporations, money in the hands of savings-banks is held in strict trust for its depositors." (Hilliard on Taxation, p. 31; *Com.* v. *People's*, 5 Allen, 428.)

The object and purposes of the corporation is, as we have seen, not to keep on hand funds with which to pay indebtedness incurred, but to loan the money of its depositors, and to distribute among them the profits of such loans. To hold that

the relation of debtor and creditor existed between them and their depositors would defeat the objects of the law of their creation. It would be to confer upon every depositor the right at pleasure to maintain an action at law to recover his debt. It would be to give any depositor the right to proceed, by attachment or execution, and thus obtain a preference over another in the repayment of his deposit. These are proceedings inconsistent with the purposes of the corporation, which place every depositor upon the same footing, and require an equitable distribution of the funds and property. From this, it follows that the Revenue Law of 1881, in so far as it applies to such property, is but a declaration of what the law has always been, and it also follows that when the property has been listed to the corporation, it cannot be taxed in another form to the depositors who are the owners thereof.

We claim :

SIXTH. THAT THE POWER OF TAXATION IS DORMANT UNLESS A CONSTITUTIONAL LAW EXISTS WHICH CALLS IT INTO ACTION. THAT THE ONLY LAW IN FORCE IS THE ACT OF 1881. THAT THE PRINCIPLE OF EQUALITY AND UNIFORMITY PERVADES AND DOMINATES THE WHOLE ACT, AND UNLESS SUCH PRINCIPLE BE MAINTAINED AS THE ESSENCE OF TAXATION, THE LAW FALLS AND THE PETITIONER IN THAT EVENT FAILS.

We rest this proposition upon the following authorities, which I will not stop to read :

Cooley on Constitutional Limitations, pages 177, 517, 518 and 520; *Reed* vs. *Omnibus R. R. Co.*, 33 Cal., 29; *Campan* vs. *Detroit*, 14 Mich., 285;

Warren vs. *Charlestown*, 2 Gray, 99 and 100; *State* vs. *Perry Co.*, 5 Ohio St., 507; *Slauson* vs. *Racine*, 13 Wis., 403; and upon the provisions of the Revenue Law under consideration.

The only law which wakes into action the dormant power of taxation is found in the Political Code, commencing at section 3607; and the initial section of this law declares that property "is subject to taxation as in this code provided." All will concede that this is the equivalent of a declaration "that property shall not be taxed by any other mode than in the code provided." But the law makers did not stop at this declaration; but in order that the object and purpose of the law should be made plain and placed beyond question, they declared further, that "nothing in this code shall be construed to require or PERMIT DOUBLE TAXATION." They expressly repealed section 3640 of the code, which provided for listing shares of stock to the individual, (see section 6, Act of 1881), and expressly provided (section 3608) that stocks should not be assessed to the shareholders, but should be listed to the corporation.

They require (section 3652) the assessor and his deputies to take an oath that they have not imposed any "double assessment." To take this oath is made the duty of the assessor, and a failure to take it would constitute sufficient grounds for removal from office. We know that the writ of mandamus is broad in its scope. That its aid has been invoked for many purposes. That it has been demanded in almost every conceivable case; but we believe that this is the first time a Court of Justice has been seriously invited to issue a prerogative writ commanding a public officer to commit perjury or to forfeit his office.

ANOTHER VIEW OF THE CASE.

Independently of all that has been said, there is another view of the case which will sustain Section 3608 of the Political Code relative to the assessment of stocks or shares of the capital stock of corporations.

The Constitution declares, Sec. 1, Art. XIII, that property "shall be taxed in proportion to its value, *to be ascertained as provided by law.*"

The effect of the words, "to be ascertained as provided by law," is to confer upon the Legislature the power to make the rules under which taxable values are to be ascertained.

The premise of the section in question is the truism "that shares of stocks in corporations possess no intrinsic value over and above the actual value of the property of the corporation (including its franchise) which they stand for and represent." Then follows a statement which is but the logical deduction from the premise, viz., that "the assessment and taxation of such shares, and also of the corporate property, would be double taxation;" and the conclusion of the section is that all property belonging to corporations shall be assessed to the corporation, and not to the individual shareholders thereof.

In *People* vs. *Bradley*, 39 Ills., pp. 144–145, it is said "the shares representing the capital stock when assessed, produce precisely the same result as when the capital stock is taxed. The amount assessed by either mode is precisely the same. The shares represent the capital stock, and the capital stock represent the shares. If listed to the shareholder he would pay the tax directly, and if listed by the corporation he would pay the same amount indirectly, as, in that case, the corporation would apply for that purpose what would otherwise

go to the shareholder as a portion of his dividends on his stock. It only accomplishes the same end in a different mode. It is in either case a tax on the shares of the capital stock, and at the same rate."

Accepting the rule deducible from the case of the *People* vs. *Bradley*, *supra*—and it must be accepted because it rests upon propositions capable of mathematical demonstration—can it be said that Section 3,608 of the Political Code is more than a legislative declaration as to how the value of stock is to be ascertained, and a legislative determination as to whom such value when so ascertained shall be assessed and taxed.

The Legislature must prescribe the means by which values are to be ascertained; and section 3608 does in substance prescribe that the value of shares of stock shall be ascertained by finding the value of all the property of the corporation. That the value so found shall be deemed and taken as the value in the aggregate of all the shares in such property, and shall be assessed and taxed to the corporations instead of to the part owners thereof.

Whether the property as a whole should be listed and taxed to the corporate entity, or whether the respective shares and interests of the part owners should be ascertained and listed and taxed to shareholders in severalty was a proper subject for legislative action, sound policy, economy and certainty in assessments and collections fully vindicate the legislative act by which the property as a whole is to be listed and taxed to the corporation. In either event, the mandate of the Constitution would be satisfied, and "stocks be taxed," unless it can be successfully maintained that twelve times one are more than twelve—"that all the parts of a thing exceed its whole."

In Conclusion.

May it please the Court: The nations of Europe with all their boasted civilization keep under arms six millions of men, and employ them either in aggression upon the rights of others or in defense of their own. In the presence of such a force armed for such a purpose, neither the right to life, liberty nor property of subject or ruler finds any security. The morning and the noon of a well ordered life bring no assurance that without fault its evening may not be spent in the dungeon or worn out in the hopeless servitude of the mine. Not the concentered power of all the Russias could give that protection to the Czar which the invisible spirit of our institutions affords to the humblest citizen. It is only where the laws are written in English that the natural rights of man are acknowledged and protected. There alone these rights, hallowed by the memories of the past, bound up in the hopes of the future and guarded by a warlike race, give to life, liberty and property the sanctions which place happiness within the reach of all. That "absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic," is the grand central idea of American liberty. It recognizes the existence of natural and inalienable rights and places these rights beyond the reach of lawful power exercised in any form. Hence it is that fifty million of people are pursuing and obtaining safety and happiness under a government, the armed force of which does not exceed twenty-five thousand men. Hence the sublime spectacle of this Court sitting in peaceful judgment upon rights and interests, which in most other countries are subject to the caprice of tyrants or are the sport of armed strife. How exalted your position. How grave your responsibility. How wide your

opportunity for good. How munificent your compensation in the knowledge that your recorded judgments will survive the passions and ambitions of the hour, and are to enter into and become part of the record of your country's glory.

The gravest question that can by any case be presented to the Court is involved in this. Mindful of your patient kindness, I now, in so far as I have been charged with it, leave it to your keeping. I do this in the abiding faith that your judgment will be in accord with the conviction of your conscience—that it will merit and receive the approval of all good men—that it will be a testimonial that, although the teaching of those who do not distinguish between license and liberty may for a time disturb, yet they leave no lasting impress upon governmental polity. That it will give back to California her old time prosperity, restore her fair name, and add new lustre to the star which marks her place in the constellation of States.